IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs November 20, 2008

STATE OF TENNESSEE v. TYRONE GARNER

Direct Appeal from the Circuit Court for Lincoln County
No. S0400159 Robert Crigler, Judge

No. M2008-00650-CCA-R3-CD - Filed January 14, 2009

The appellant, Tyrone Garner, pled guilty in the Lincoln County Circuit Court to possession of a Schedule II controlled substance with intent to deliver, a Class B felony, and the trial court sentenced him to ten years, six months to be served in confinement.[1] On appeal, he contends that the trial court erred by denying his request for alternative sentencing. Based upon the record and the parties' briefs, we conclude that the trial court did not err by denying the appellant's request for probation or community corrections. However, because the trial court entered two separate judgments of conviction showing that the appellant pled guilty to possession of a Schedule II controlled substance with intent to deliver and possession of a Schedule II controlled substance with intent to sell, we remand the case to the trial court for entry of corrected judgments.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed and the Case Remanded

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which DAVID H. WELLES and JOHN EVERETT WILLIAMS, JJ., joined.

Andrew Jackson Dearing, III, Shelbyville, Tennessee, and N. Andy Myrick, Jr., Fayetteville, Tennessee, for the appellant, Tyrone Garner.

Robert E. Cooper, Jr., Attorney General and Reporter; Matthew Bryant Haskell, Assistant Attorney General; Charles Frank Crawford, Jr., District Attorney General; and Ann L. Filer and Melissa Thomas, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

I. Facts

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[1] According to the appellant's brief, the trial court approved a negotiated sentence of ten years, six months. However, the record shows that the appellant entered an open plea with the length and manner of service of the sentence to be determined by the trial court after a sentencing hearing.

The appellant was charged with possession of a Schedule II controlled substance with intent to sell, count one, and possession of a Schedule II controlled substance with intent to deliver, count two. At his February 22, 2005 guilty plea hearing, he agreed to plead guilty to count two, and the State agreed to dismiss count one via nolle prosequi. The State then gave the following factual account: On October 24, 2003, a confidential informant told Agent Tim Miller of the Seventeenth Judicial District Drug Task Force that she could buy cocaine from "T," an African-American male who lived in Huntsville, Alabama. The informant set up the buy and met "T," who turned out to be the appellant, at a Conoco gas station near the Alabama/Tennessee border. The informant then called Agent Miller, and he agreed to meet her and the appellant at a McDonald's in Fayetteville, Tennessee, in order to give the informant the money she needed to buy the cocaine. Drug task force agents went to the McDonald's and arrested the appellant. A search of his person revealed bags of crack cocaine, four hundred seventy-two dollars in cash, and a cellular telephone. The appellant confessed to the agents that he brought the cocaine to Tennessee in order to sell it. The total weight of the cocaine was more than one-half gram. The trial court accepted the appellant's guilty plea to count two, possession of a Schedule II controlled substance with intent to deliver, and scheduled a sentencing hearing for April 19, 2005. However, the appellant absconded to Alabama and did not return for the hearing. The appellant was finally extradited back to Tennessee, and his sentencing hearing was held on March 4, 2008.

At the hearing, the trial court announced that it would be sentencing the appellant for possession of a Schedule II controlled substance with intent to deliver and possession of a Schedule II controlled substance with intent to sell.[2] Neither defense counsel nor the State corrected the trial court. The appellant testified that after he got into trouble in Tennessee, he spent time in Decatur General West Behavioral Center, where he was diagnosed as bipolar. Although he was prescribed medication, he stated that he was no longer taking it because "they got the wrong prescription for me." The appellant said he needed to start taking medication again. He acknowledged that after he pled guilty in this case, he went to Alabama and failed to return to Tennessee for his sentencing hearing. He said that he did not return for the hearing because of his bipolar condition and because he was addicted to marijuana, codeine, and pills. He also stated that he had no control over himself and was "having episodes and stuff." In Alabama, the appellant committed additional crimes and was arrested. He pled guilty and served fifteen months in confinement. He was released on probation and was extradited to Tennessee. He acknowledged that he currently was on probation in Alabama.

The appellant testified that he had only a ninth or tenth grade education but that he planned to obtain his GED. He stated that he began using illegal drugs when he was eight or nine years old and that he got the drugs from his brothers. He said that he planned to attend a treatment program such as Alcoholics Anonymous or Narcotics Anonymous, that he would get a job, and that "whatever I can do I am going to do it to try to stay out of trouble." The appellant stated that he wanted a chance to get his life together and that his step-father and mother would help him. He said that he

[2] The judge at the sentencing hearing was not the judge who presided over the appellant's guilty plea hearing.

had been approved to receive Social Security benefits for his mental condition but that he was not yet receiving them.

On cross-examination, the appellant acknowledged that he had convictions in Alabama for receiving stolen property, possession of marijuana, alluding the police, and traffic offenses. He said that if the trial court ordered a drug test, he would be "clean." He said he had done some construction work but stopped working when he qualified for Social Security benefits. He acknowledged that he sold drugs in Alabama on December 16, 2006, and that he had a juvenile record "for some misdemeanors."

The State introduced the appellant's presentence report into evidence. According to the report, the then twenty-two-year-old appellant dropped out of high school in 2001 and 2003. In the report, he stated that his physical health was good, that his mental health was poor, and that he was prescribed Depakote and Zyprexin for his bipolar condition. The appellant also stated in the report that he began drinking alcohol when he was ten years old and that he currently was drinking a "6 PACK" every day. He said he began using drugs when he was eight years old, that he used one-half ounce of marijuana per day, and that he had not used the drug since February 28, 2005. The report shows no employment history. According to the report, the appellant has prior convictions in Alabama for cocaine possession, receiving stolen property, harassing communications, marijuana possession, running a red light, driving without a license, driving with expired license tags, and attempting to elude police.

The trial court merged count two into count one and noted that the range of punishment for a standard, Range I offender convicted of a Class B felony was eight to twelve years. See Tenn. Code Ann. § 40-35-112(a)(2). It also noted that because the offense was a Class B felony, the appellant was not presumed to be a favorable candidate for alternative sentencing and that the amount of cocaine involved in this case was "sizeable." The trial court enhanced the appellant's sentence based upon his prior criminal convictions and drug use and sentenced him to ten years, six months. The court concluded that the appellant's lack of employment and social history reflected poorly on his candidacy for alternative sentencing. The court denied the appellant's request for an alternative sentence in order to avoid depreciating the seriousness of the offense because the appellant had a long history of criminal conduct for his age and because less restrictive measures than confinement or in conjunction with confinement had been applied unsuccessfully to the appellant.

II. Analysis

The appellant contends that given the circumstances of the case, he should have received probation or a community corrections sentence. He argues that the case was not shocking, that the need for deterrence was not supported by the proof, and that serving his sentence on probation would allow him to support himself. He also contends that he needs treatment for his mental condition and drug addiction and that he would be able to receive that treatment in the community corrections program. The State argues that the trial court properly denied the appellant's request for alternative

sentencing. We agree with the State.

When an appellant challenges the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). However, this presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). If the record demonstrates that the trial court failed to consider the sentencing principles and the relevant facts and circumstances, review of the sentence will be purely de novo. Id.

In conducting our review, this court must consider (1) the evidence, if any, received at trial and at the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to the sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancement factors; (6) any statements made by the appellant on his own behalf; and (7) the appellant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, -210 (2005). See also Ashby, 823 S.W.2d at 168. The burden of showing that a sentence was improper is on the appellant. Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments.

Tennessee Code Annotated section 40-35-102(5) provides that only "convicted felons committing the most severe offenses, possessing criminal histories evincing a clear disregard for the laws and morals of society, and evincing failure of past efforts at rehabilitation shall be given first priority regarding sentencing involving incarceration." For crimes committed prior to June 7, 2005, as in this case, a defendant who is an especially mitigated or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing. See Tenn. Code Ann. § 40-35-102(6) (2003). Moreover, a defendant is eligible for probation if the sentence actually imposed is eight years or less. See Tenn. Code Ann. § 40-35-303(a) (2003).

The Community Corrections Act of 1985 was enacted to provide an alternative means of punishment for "selected, nonviolent felony offenders in front-end community based alternatives to incarceration." Tenn. Code Ann. § 40-36-103. Tennessee Code Annotated section 40-36-106(a)(1) provides that an offender who meets all of the following minimum criteria shall be considered eligible for community corrections:

> (A) Persons who, without this option, would be incarcerated in a correctional institution;
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> (B) Persons who are convicted of property-related, or drug/alcohol-related felony offenses or other felony offenses not involving crimes against the person as provided in title 39, chapter 13, parts 1-5;
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> (C) Persons who are convicted of nonviolent felony offenses;

> (D) Persons who are convicted of felony offenses in which the use or possession of a weapon was not involved;
>
> (E) Persons who do not demonstrate a present or past pattern of behavior indicating violence;
>
> (F) Persons who do not demonstrate a pattern of committing violent offenses . . . .

For offenders not eligible for community corrections under subsection (a), Tennessee Code Annotated section 40-36-106(c) creates a "special needs" category of eligibility. Subsection (c) provides that

> [f]elony offenders not otherwise eligible under subsection (a), and who would be usually considered unfit for probation due to histories of chronic alcohol, drug abuse, or mental health problems, but whose special needs are treatable and could be served best in the community rather than in a correctional institution, may be considered eligible for punishment in the community under the provisions of this chapter.

Tenn. Code Ann. § 40-36-106(c).

Because the trial court sentenced the appellant to ten years, six months, the appellant was not eligible for probation. Turning to the appellant's request for community corrections, we also note that because he was convicted of a Class B felony, he was not presumed to be a favorable candidate for alternative sentencing. Furthermore, the presentence report reflects that the appellant has numerous prior convictions, including felony convictions in Alabama for cocaine possession and receiving stolen property, and that he has been using illegal drugs since he was eight years old. He has never sought treatment for his addiction, and his potential for rehabilitation is poor. We agree with the appellant that the facts of this case did not warrant a finding that confinement was needed to avoid depreciating the seriousness of the offense. See State v. Zeolia, 928 S.W.2d 457, 462 (Tenn. Crim. App. 1996) (stating that in denying full probation to avoid depreciating the seriousness of the offense, the criminal act should be especially violent, horrifying, shocking, reprehensible, offensive, or otherwise of an excessive or exaggerated degree). However, given the appellant's prior convictions, his extensive drug use, and his failure to seek treatment, the trial court did not err by denying the appellant's request for alternative sentencing.

III. Conclusion

Based upon the record and the parties' briefs, we affirm the trial court's denial of the appellant's request for alternative sentencing. However, we remand the case to the trial court in order for the court to enter corrected judgments of conviction, showing that the State dismissed count one, possession of a Schedule II controlled substance with intent to sell, via nolle prosequi and that

the appellant pled guilty to count two, possession of a Schedule II controlled substance with intent to deliver.

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NORMA McGEE OGLE, JUDGE